SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. ~~643~~ 11

FORD MOTOR COMPANY,

Appellant

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA

STATEMENT AS TO JURISDICTION

CLIFFORD B. LONGLEY,
WALLACE R. MIDDLETON,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutes believed to sustain jurisdiction	1
Federal statute involved	2
Date of decree and application for appeal	2
Statement showing that the nature of the case and of the rulings of the court were such as to bring the case within the jurisdictional provisions relied on	2
The grounds upon which it is contended that the questions involved are substantial	4
Appendix-Findings of fact, conclusions of law and order of District Court	11

Table of Cases Cited

Chrysler Corporation v. *United States*, 316 U. S. 556	4
Swift & Company v. *United States*, 276 U. S. 311	4

Statutes Cited

United States Code, Title 15, Sections 1-7	2
Section 15	2
Title 28, Section 345	1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 643

FORD MOTOR COMPANY, A DELAWARE CORPORATION,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE ORDER APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12

Pursuant to Supreme Court Rule 12, paragraph 1, Ford Motor Company, the above appellant, files this, its statement particularly disclosing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the order appealed from herein, as follows:

I. The statutes believed to sustain appellate jurisdiction are:

A. Section 345 of Title 28 of the United States Code which provides, so far as is material here, that "a direct review

by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following sections or parts of sections and not otherwise: (1) Section 29 of Title 15," * * *.

B. Section 29 of Title 15 of the United States Code which provides, so far as is material here, that "In every suit in equity brought in any District Court of the United States under Sections 1-7, Title 15 U. S. C., wherein the United States is complainant, an appeal from the final decree of the District Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof:" * * *.

II. The order appealed from was dated and entered on the 25th day of July, 1946.

III. The application for an appeal was presented on the 17th day of September, 1946.

IV. Statement showing that the nature of the case and of the rulings of the court were such as to bring the case within the jurisdictional provisions relied on.

The case is a suit in equity brought in the District Court for the Northern District of Indiana under Sections 1-7, Title 15 U. S. C., wherein the United States is complainant, and the order appealed from is a final order as appears below.

In 1938, separate indictments were returned against appellant and General Motors Corporation charging that each conspired with certain finance companies to restrain trade and commerce in the wholesale and retail sale and financing of its automobiles in violation of the Sherman Act (15 U. S. C. Sec. 1).

General Motors stood trial under its indictment, but appellant consented to the entry of a decree enjoining certain

practices complained of and the indictment against it was quashed. The injunction against such practices was contained in paragraphs 6 and 7 of the decree and prohibited specific practices tending to influence dealers in their selection of finance companies.

Paragraph 12 of the decree enjoined appellant from purchasing the securities of a finance company. This was an ancillary matter not directly involved in the indictment.

The decree provided in paragraph 12a that, if a general verdict of guilty were returned against General Motors, such of the restraints imposed by paragraphs 6 and 7 as were not imposed in substantially identical terms on General Motors by that verdict should be suspended, and that the instructions of the trial court in that case should be used to determine what restraints the verdict imposed. A general verdict of guilty was returned against General Motors. The motion of appellant sought suspension of certain of these restraints on the ground that they were not imposed in substantially identical terms on General Motors by that verdict under the instructions given. One part of the order appealed from denied this motion and was therefore a final determination that appellant is not entitled to relief under paragraph 12a of the decree.

The decree in paragraph 12 contemplated a future civil action against General Motors and provided that the restraint in such paragraph against purchase of the securities of a finance company would terminate on January 1, 1941, if on or before that date the Government had not in such action obtained a final decree not subject to further review requiring General Motors Corporation to divest itself of General Motors Acceptance Corporation and provided for the entry, on application of appellant, of an order evidencing such termination. This date was extended from year to year by consent of the parties until it now

reads January 1, 1946. No final decree has been entered requiring General Motors to divest itself of General Motors Acceptance Corporation and appellant has not consented to any further extension. The other part of the order appealed from denied appellant's motion for the entry of an order evidencing the termination of this restraint and granted the Government's motion for an extension of the date from January 1, 1946, to January 1, 1947. This aspect of the order is final because it denies to appellant a right conferred on it by the decree, amends the decree and constitutes a final determination of the basis on which such an amendment can be made or denied.

It is submitted, therefore, that all jurisdictional requirements of the statutes relied upon are met and that appeal will lie to and only to the Supreme Court.

The cases believed to sustain the jurisdiction are as follows:

Swift & Company v. *United States*, 276 U. S. 311;
Chrysler Corporation v. *United States*, 316 U. S. 556.

V. The grounds upon which it is contended that the questions involved are substantial.

The Government desired to prevent the three largest automobile companies, General Motors, Chrysler and appellant, from influencing dealers in their selection of finance companies either by conduct claimed to amount to discrimination between dealers and finance companies for this purpose or by the mere ownership of finance companies. The above mentioned indictments and a similar indictment against Chrysler were based on charges of such acts of discrimination. The prevention of ownership of finance companies was to be accomplished by civil action.

These three companies manufactured about ninety per cent of all cars sold and the competition of each of them with the others was aggressive.

The influence of the manufacturer on the financing arrangements of its dealers was an important weapon in this competitive battle. About sixty per cent of all retail sales were financed. A larger percentage of wholesale sales were financed. The finance charges became a part of the cost to the purchaser. The lower the charges and the more lenient the terms of repayment, the greater was the market for cars. The more reasonable the collection practices of the finance company chosen by the dealer, the greater was the good will of the manufacturer, under whose trade mark the dealer was given a franchise to operate. The more liberal the wholesale financing of the dealer organization, the larger were the dealers' operations. The experience of the manufacturers had been that, in the absence of their influence in these financing arrangements, independent lending institutions, motivated by desire for profit from and safety in their investments rather than by desire to increase car sales and manufacturers' profit, would not by competition between themselves achieve the same results.

Because of this situation the changes contemplated by the Government had to be imposed on all three manufacturers to substantially the same extent and at nearly the same time. Otherwise any benefit that might inure to the public from the changes would be nullified by the injury that might result to the public from the disturbance of the equality of competitive conditions as between the manufacturers.

This would have been simple had all three manufacturers consented to a decree, but a problem arose when General Motors (manufacturing 47% of all cars sold) refused to consent to a decree while Chrysler and Ford (manufacturing 24% and 19% respectively) were willing to do so.

At that time there were no Sherman Law precedents in the automobile financing field. Whether or not the various restraints in the proposed consent decree went beyond the Sherman Act were undecided questions, but the General Motors refusal promised litigation and precedents settling some or all of those questions. The General Motors refusal also suggested that Ford and Chrysler might be forever restrained from doing things which their main competitor would be free to do. In order to reserve those undecided questions and protect Ford and Chrysler from competitive disadvantage with General Motors it was necessary that the consent decrees adjust themselves to the progress of the General Motors litigation. Hence, the suspension provisions of paragraph 12a of the decree and the termination provisions of paragraph 12.

We will proceed first to discuss the part of the order appealed from denying suspension under paragraph 12a of certain specific restraints in paragraphs 6 and 7 against acts of claimed discrimination between dealers and finance companies.

Unless the trial court in the General Motors criminal case instructed the jury that it was illegal to recommend, endorse or advertise a finance company or arrange with a finance company representative to visit a dealer, then appellant was entitled by the terms of the decree to have restrictions of that character suspended. Appellant moved for such suspensions, claiming that there were no such instructions and pointing out that, on the contrary, the trial court affirmatively instructed that it was not wrong for General Motors to have a finance company or recommend its use or explain the character of its operations, point out its advantages, persuade the dealers to use it, or even argue with dealers that it should be used.

The lower court finds that according to the instructions in the General Motors case it was illegal to recommend, endorse, advertise, or arrange for visits, all as enjoined by paragraphs 6(e), 6(i), 6(k) and 7(d) of the decree.

If the lower court has misconstrued the instructions in the General Motors case, then General Motors is as free to perform such acts as it would have been had there never been an indictment, while appellant is permanently enjoined. Thus there is left in the hands of General Motors a competitive weapon denied to its main competitors, which tends, contrary to the public interest, to create a monopoly in restraint of trade.

Appellant claims that none of these acts are in violation of the Sherman Act, and, hence, that it would be impossible for the Government or appellant to impose those restrictions on General Motors. If this be true, this condition of competitive inequality in favor of General Motors, like the order that creates it, is permanent. If this be untrue, while the Government or appellant might by civil action seek to impose those restrictions on General Motors, appellant would have no assurance that the Government would proceed or that the outcome of such litigation would restore competitive equality.

The provisions of paragraph 12a of the decree were framed to meet just this situation. They provided for the suspension of those restraints but only for the period during which they were not imposed on General Motors. Therefore, if the Government claims that any of the acts restrained are illegal notwithstanding the failure of the trial court in the General Motors criminal case so to instruct the jury, it is entirely free to proceed in a contested civil action or by consent decree to impose such restraints on General Motors and, if successful, these restraints would

again become operative against appellant. In the meantime, competitive equality would not have been sacrificed.

Now we will discuss the part of the order appealed from denying termination of the restraint against acquisition of a finance company. The effect of this part of the order is to make it possible that restraints may be permanently imposed on appellant which may not be imposed on General Motors Corporation. Even if General Motors in the Government's civil action against it is required by decree to divest itself of General Motors Acceptance Corporation, it is not known what restraints that decree will contain with reference to future acquisition of a finance company by General Motors. If the General Motors case decides that investment by an automobile manufacturer in a finance company is *per se* unlawful, then that case will by *stare decisis* preclude investment by appellant in a finance company regardless of the lifting of the restraint in this decree. But if the General Motors case is decided on some other basis allowing investment in a finance company under certain circumstances, as for example that it will be allowed to acquire a new finance company but not be allowed to continue ownership of a finance company developed as a result of the practices for which it was convicted in the criminal case and thus retain the fruits of such practices and enjoy the continuing effect of such practices, then such decree will not establish the illegality *per se* of ownership of a finance company. In that case appellant should be entitled to the benefits of the decree it agreed to and not be permanently restrained from doing something that might be lawful for General Motors to do. There is no provision in paragraph 12 of this decree for the subsequent modification of the injunction against acquisition of securities of a finance company, if that injunction is made final by a decision adverse to General Motors in that case, to correspond to the

decision in that case. Hence the lower court's modification of paragraph 12 without the consent of appellant does not serve to effectuate the basic purposes of the decree.

The situation has some similarities to *Chrysler Corporation* v. *United States* (supra), a case involving an identical paragraph in the Chrysler consent decree. Chrysler refused to consent to the extension of its termination date beyond January 1, 1941. This court, although it considered four years a "markedly generous" time for the Government to obtain a decree requiring General Motors Corporation to divest itself of General Motors Acceptance Corporation, sustained the lower court's finding that the time was not unreasonable under the circumstances then existing. Taking judicial notice of the fact that no automobiles were being manufactured, this court held that it was not improper to extend the termination date to January 1, 1943, in the absence of a showing by Chrysler of why it needed a finance company affiliate during the war. During the war appellant consented to extending its termination date, but now, with the resumption of automobile manufacture, it resists extension of that date beyond January 1, 1946. If four years to conclude a case was a "markedly generous" allowance, it seems improbable that any circumstances could have existed which would have made it reasonable not to obtain such a decree by January 1, 1946, a period of more than seven years. The district court did not have before it any evidence of any circumstances which would have been sufficient to indicate that any such long period was reasonable, and therefore its finding of diligence by the Government and its extension of the period for obtaining such a decree to January 1, 1947, was not reasonable. Furthermore, although we claim that the apparent shifting of the burden of proof to Chrysler in that case was due to the court's taking judicial notice of the fact that no automobiles were being produced during the war and not due to a change in the

fundamental rule that parties moving to modify a consent decree have the burden of proof, appellant did file affidavits showing material competitive disadvantage as a result of its inability to own a finance company. No contrary evidence was furnished by the Government and the District Court's finding that appellant offered no such evidence appears erroneous.

It is, therefore, respectfully submitted that this court has jurisdiction of this appeal and that the questions involved are substantial.

The District Court did not deliver any opinion.

Dated September 17, 1946.

(Sgd.) CLIFFORD B. LONGLEY,
(Sgd.) WALLACE R. MIDDLETON,
Attorneys for Appellant, Ford Motor Company.

APPENDIX

Findings of Fact, Conclusions of Law, and Order

At a session of said Court, held in the Court House in the City of Hammond, State of Indiana, on the 10th day of June, A. D. 1946.

Present and Presiding: The Honorable Patrick T. Stone, District Judge.

The United States has moved that this Court extend the period provided in paragraph 12 of the consent decree entered in this cause on November 15, 1938 beyond January 1, 1946, the date to which it was previously extended by consent of the parties, and respondent Ford Motor Company has opposed this motion and in turn moved that this Court enter an order pursuant to paragraph 12 that nothing in said consent decree shall preclude said respondent from acquiring and retaining ownership of, control over or interest in any finance company, or from dealing with such finance company and with said respondent's dealers in the manner provided in said decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a thereof. In addition, respondent Ford Motor Company has moved pursuant to paragraph 12a of said decree that the provisions of subparagraphs (i) and (k) of paragraph 6 of said decree be suspended until similar provisions are imposed upon General Motors Corporation and that subparagraph (e) of said paragraph 6 be modified to the extent necessary to permit said respondent to do those things prohibited by said subparagraphs (i) and (k) which might also be prohibited by said subparagraph (e) such modification to continue until provisions similar to said subparagraph (e) without such modification are imposed on General Motors Corporation. Also, all respondent finance companies have moved for suspension of subparagraph (d) of paragraph 7 of said decree until a similar provision is imposed upon General Motors Acceptance Corporation.

All of said motions have been heard upon affidavits and arguments of counsel in open court, the complainant appearing by Wendell Berge, Esq. Assistant Attorney General,

Holmes Baldridge, Esq. Special Assistant to the Attorney General, Alexander M. Campbell, Esq. United States Attorney for the Northern District of Indiana, the respondent Ford Motor Company appearing by Clifford B. Longley, Esq. Wallace R. Middleton, Esq., Frederick C. Nash, Esq., and Messrs. Crumpacker, May, Carlisle & Beamer, and the respondents, Commercial Investment Trust Corporation, et al., appearing by Samuel S. Isseks, Esq., Alphonse A. La Porte, Esq. and Messrs. Scheer, Scheer and Taylor, and Russell Hardy, Esq. having, with the permission of the Court, filed a brief amicus curiae, and the Court, having considered the proofs, the arguments of counsel, and the briefs filed, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law;

Findings of Fact

1. That the purpose of the second unnumbered paragraph of paragraph 12 of said decree was not only to protect respondent, Ford Motor Company, from the competitive disadvantage that might result from the continued ownership of General Motors Acceptance Corporation by General Motors Corporation if the civil suit of The United States against General Motors Corporation to require it to divest itself of General Motors Acceptance Corporation was delayed, but also to give respondent, Ford Motor Company, an opportunity to defend itself on the question of affiliation after the time limit set forth in such paragraph had expired.

2. That the suit instituted by the United States against General Motors Corporation to require that corporation to divest itself of ownership of General Motors Acceptance Corporation is still pending in the United States District Court at Chicago, Illinois, and has not been reached for trial. However, the plaintiff has proceeded diligently and expeditiously in its said suit.

3. That jurisdiction of this action was specifically retained in this Court for the purpose of requiring compliance with the terms of the decree, or for the purpose of modifying the decree upon proper showing.

4. That this Court has jurisdiction to hear and dispose of the subject matter of complainant's motion and of respondents motions.

5. That certain provisions of Paragraphs 6 and 7 of the decree herein were to be suspended in the event of failure of complainant to secure general verdicts of guilty against General Motors Corporation, General Motors Acceptance Corporation and others in a then pending criminal antitrust proceeding by January 1, 1940.

6. That the Court takes judicial notice of the fact that general verdicts of guilty were obtained against General Motors Corporation, General Motors Acceptance Corporation and others on November 17, 1939, and that such general verdicts were sustained on appeal.

7. That the trial court in its instructions to the Jury in the criminal antitrust proceedings against General Motors Corporation, et al., held that the agreements, acts, and practices enjoined in Paragraphs 6 (i), 6 (k) and 7 (d) of the Ford decree herein, among others, constituted a proper basis for the return of a general verdict of guilty.

8. That under Paragraph 12a (2) of the decree herein, the general verdict of guilty in the General Motors case, under the instructions to the jury by the trial court, is equivalent to a decree restraining the performance by General Motors Corporation of such agreement, acts, or practices as are enjoined herein by paragraphs 6 (i), 6(k) and 7 (d) and other paragraphs of the decree.

9. That the prohibitions contained in Paragraphs 6 (i), 6 (k) and 7 (d) of the decree herein have been imposed in substantially identical terms upon General Motors Corporation and General Motors Acceptance Corporation as a result of the general verdict of guilty against them under proper instructions from the trial court in accordance with the provisions of Paragraph 12a (2) of the decree herein.

10. That respondents are not laboring under any competitive disadvantage with General Motors Corporation and General Motors Acceptance Corporation in the manu-

facture, sale, and financing of Ford cars by virtue of the prohibitions contained in Paragraphs 6 (i), 6 (k) and 7 (d) of the decree herein, and offered no evidence showing competitive disadvantage.

11. That the decree provided for a termination of the bar against affiliation, if the civil proceedings against General Motors Corporation and General Motors Acceptance Corporation were not successfully concluded by a court of last resort by January 1, 1941.

12. That by agreement among the parties the date for termination of the bar against affiliation has been extended from time to time to January 1, 1946.

13. That the provisions of paragraph 12 of the decree, relating to the bar against affiliation, were framed upon the basis that the ultimate rights of the parties thereunder should be determined by the Government's civil antitrust suit against General Motors Corporation and General Motors Acceptance Corporation.

14. That time was not of the essence with respect to lapse of the bar against affiliation.

15. That respondent, Ford Motor Company, has offered no proof that further extension of the bar against affiliation will place it at a competitive disadvantage with General Motors Corporation.

16. That further extension of the bar against affiliation until January 1, 1947, will not impose a serious burden upon respondent, Ford Motor Company, and will not place respondent, Ford Motor Company, at a competitive disadvantage as regards General Motors Corporation.

Conclusions of Law

1. That the Court has jurisdiction to entertain the several motions and to make a proper order, or orders, pursuant thereto.

2. That under Paragraph 12a (2) of the decree, general verdicts of guilty against General Motors Corporation and

others in the criminal antitrust proceedings, under proper instructions from the trial court, must be considered the equivalent of a decree against General Motors Corporation restraining the performance by General Motors Corporation of any agreements, acts, or practices which the trial court, in its instructions to the jury, held was a violation of the Sherman Act.

3. That under Paragraph 12a (3) of the decree herein, the restraints imposed by subparagraphs (d) to (f) and (h) to (I) inclusive, of Paragraph 6, and subparagraphs (a), (c) and (d) of Paragraph 7, are not subject to suspension provided the equivalent of a decree, as set out in Paragraph 12a (2), is secured against General Motors Corporation.

4. That the purpose and intent of Paragraph 12 was to provide that the test of the permanency of the bar against affiliation was to abide the outcome of the civil antitrust suit against General Motors Corporation, and that the time clause was subsidiary to such main purpose.

5. That the purpose and intent of the decree will be carried out if Ford Motor Company is given the opportunity at any future time to propose a plan for the acquisition of a finance company, and to make a showing that such plan is necessary to prevent Ford Motor Company from being placed at a competitive disadvantage during the pendency of complainant's civil litigation against General Motors Corporation, et al.

Now, Therefore, It Is Ordered, Adjudged and Decreed That:

1. The motion of Ford Motor Company seeking a suspension of subparagraphs (i) and (k) of paragraph 6 of the decree, subparagraph (d) of Paragraph 7 of the decree, and such parts of subparagraph (e) of Paragraph 6 of the decree as may be necessary to do the things now prohibited by subparagraphs (i) and (k) of Paragraph 6, until such time as they shall be imposed upon General Motors Corporation and its subsidiaries, either by consent decree, or by final decree of a court of competent jurisdiction not subject

to further review, or by decree of such court, which, although subject to further review, continues effective, be and the same is hereby denied.

2. The motion of Commercial Investment Trust Corporation and others seeking a suspension of subparagraphs (i) and (k) of Paragraph 6 of the decree, subparagraph (d) of Paragraph 7 of the decree, and such parts of subparagraph (e) of Paragraph 6 of the decree as may be necessary to do the things now prohibited by subparagraphs (i) and (k) of Paragraph 6, until such time as they shall be imposed upon General Motors Corporation and its subsidiaries, either by consent decree, or by final decree of a court of competent jurisdiction not subject to further review, or by decree of such court which, although subject to further review, continues effective, be and the same is hereby denied.

3. The motion of Ford Motor Company that an order be entered pursuant to Paragraph 12 of the decree, permitting Ford Motor Company to acquire and retain ownership of and control over or interest in any finance company, be and the same is hereby denied.

It Is Ordered Further that the aforesaid final decree as modified shall be and is hereby modified so that the second paragraph of Paragraph 12 thereof shall read as follows:

It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been entered on or before January 1, 1947, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a. The Court, upon application of the respondents or any of them, will enter an order or

decree to that effect at the foot of this decree, and the right of any respondent herein, to make the application and to obtain such order or decree is expressly conceded and granted.

And It Is Further Ordered, Adjudged and Decreed That except as thus modified, the modified decree as previously entered shall stand in full force and effect. Dated this 25th day of July, 1946.

PATRICK T. STONE,
United States District Judge.

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